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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-795** .

MAURICE McKINNEY TAYLOR,
Petitioner,

VS.

STATE OF TENNESSEE,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TENNESSEE**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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Petitioner, Maurice McKinney Taylor, prays that a writ of certiorari be granted to review the judgment of the Court of Criminal Appeals of Tennessee entered in this case on June 9, 1976.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee is not yet reported and is reprinted in the Appendix hereto at page A1. The order of the Supreme Court of Tennessee of August 16, 1976 denying Petitioner's Petition for Certiorari is reprinted in the Appendix at page A10. Mr. Justice Stewart's order extending the time for filing this Petition for Certiorari to December 14, 1976 is reprinted in the Appendix at page A11.

JURISDICTION

The judgment of the Court of Criminal Appeals of Tennessee was entered on June 8, 1976. The Petition for Certiorari to the Supreme Court of Tennessee was denied on August 16, 1976. Mr. Justice Stewart, by order entered on November 10, 1976, extended the time for filing the Petition for Certiorari to this Court to December 14, 1976. This Court has jurisdiction under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. WHETHER THE OPINION OF THE COURT OF CRIMINAL APPEALS SHOULD BE REVIEWED BY THIS COURT: (a) BECAUSE THE COURT DECIDED THIS CASE IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, TO-WIT: THIS COURT HAS NEVER HELD THAT A "HARMLESS ERROR" RULE IS APPLICABLE TO VIOLATIONS OF RIGHTS GUARANTEED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, *E.G.*, *MAPP V. OHIO*, 367 U.S. 643 (1963); (b) BECAUSE THE COURT HAS DECIDED A QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS COURT, TO-WIT: THE COURT DECIDED THAT IN CASES INVOLVING VIOLATIONS OF RIGHTS GUARANTEED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION THE RULE WHICH MAY HAVE BEEN STATED BY THIS COURT IN *FAHY V. CONNECTICUT*, 375 U.S. 85 (1963), WOULD GOVERN THE FACTS OF THIS CASE, RATHER THAN RULES WHICH HAVE BEEN STATED IN TWO OTHER CASES BY THIS COURT, NAMELY, *CHAPMAN V. CALIFORNIA*, 386 U.S. 18 (1967), AND *HARRINGTON V. CALIFORNIA*, 395 U.S. 250 (1969).

2. WHETHER THE OPINION OF THE COURT OF APPEALS (a) DECIDED A FEDERAL QUESTION OF SUBSTANCE IN A WAY PROBABLY NOT IN ACCORD WITH AN APPLICABLE DECISION OF THIS COURT, NAMELY, *POINTER V. TEXAS*, 380 U.S. 400 (1965) IN THAT THE TRIAL COURT IN THIS CAUSE ERRED IN NOT STRIKING THE TESTIMONY OF WITNESSES DUNN AND MASON IN WHOLE OR IN PART AFTER THEY ASSERTED THEIR FIFTH AMENDMENT RIGHTS NOT TO INCRIMINATE THEMSELVES; (b) THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE NOT HERETOFORE DECIDED BY THIS COURT, NAMELY, WHETHER IT IS PROPER TO APPLY A HARMLESS ERROR RULE, OR WHETHER THE PROPER REMEDY IS TO STRIKE THE TESTIMONY OF THOSE WITNESSES WHO ASSERT THEIR FIFTH AMENDMENT RIGHTS WHILE TESTIFYING AGAINST AN ACCUSED.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. V

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

U.S. CONST. amend. XIV, Sec. 1

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari presented by Petitioner who was charged in the Davidson County Criminal Court, Division 2, Nashville, Tennessee, with murder in the first degree, being charged in the deaths of James Widener and Mildred Hazlewood (TR pp. 3, 4; BE p. 529).¹ Defendant was found guilty by a jury of both counts of murder and sentenced to concurrent terms of life imprisonment (BE pp. 565-566).

The State's evidence was bottomed upon circumstantial evidence, there being no witnesses produced who saw the demise of James Widener and Mildred Hazlewood. The latter two persons were found dead in an alley in downtown Nashville, Tennessee around 10:00 P.M. on November 27, 1973 (BE pp. 50-57; 58-62; 86). The victims died from gunshot wounds (BE pp. 100-108; 110-114). The investigation of the authorities revealed that Petitioner

1. The Technical Record (hereinafter "TR p.") in this cause is numbered pp. 1-..... and consists of the pleadings, minute entries and orders of the Court, notice of appeal, and other record entries. The Bill of Exceptions (hereinafter "BE p.") consists of pp. 1-569 and is the record of the trial testimony of the witnesses and the other proceedings in the trial court.

(hereinafter "Taylor" or "Defendant") was seen in the general area of the crime near the motel where Mrs. Hazlewood was registered on November 27, 1973, at about 9:00 P.M. In fact Taylor was observed in the same restaurant where the victims had dinner prior to their deaths (BE pp. 227-232). Thereafter, Defendant, a Negro male, was observed with two other Negro males in Memphis, Tennessee several days after the murders, doing the following:

Defendant was observed with Dunn and Mason, the other Negro males, using Widener's Master Charge credit card to purchase an airline ticket, although Taylor did not himself use the card (BE pp. 247-253); Taylor, Dunn and Mason, on or about 3:00 P.M. on November 29, 1973, were observed in Memphis Sears & Roebuck Store where several purchases were made by Dunn, using Widener's Sears charge card; after a purchase was made which required further checking by the store, Dunn produced by way of identification the car title to Widener's car and Widener's Master Charge card; whereupon, the police were called, and the three fled in Widener's automobile (BE pp. 256-273; 277-280). During the day of November 29, 1973, Widener's automobile was parked in a Memphis parking lot (BE pp. 283-289). About 3:00 P.M. in Memphis on November 29, 1973, police officers arrested Taylor, Dunn and Mason in a Memphis Motel after a shootout, and at the scene of this fracas found a gun which was ultimately shown to be the murder weapon and a coin purse, ring and watch belonging to the victims (BE pp. 289-346; 362-376; 47-48; 71-74).

Subsequently, Dunn and Mason decided to become witnesses against Taylor, and they testified that although Taylor never told them he had killed Widener and Mrs. Hazlewood, he was gone from the motel room the three

were sharing in Nashville the day and time of the murders; that shortly after the time of the murders, Taylor was excited, told the others that everyone had to leave town immediately; that thereupon the three left in Widener's automobile, went to Memphis, Tennessee, parked the car in Memphis and used Widener's credit cards in Memphis. The two further testified that the murder and two other weapons had been purchased prior to the murders in Atlanta, Georgia; the two further testified that on the evening of the murders Taylor had fired his weapon into the ceiling of their motel room in Memphis (BE pp. 405-421; 458-488). The State also called witnesses to corroborate Dunn and Mason's story with regard to the firing of the weapon into the ceiling of the motel room (BE pp. 511-514; 517-522), and with regard to the purchase of the weapons, including the murder weapon (BE pp. 5-29). Taylor's fingerprint was said to be "lifted" from a glass which was found in the motel room occupied by one or both victims prior to their deaths (BE pp. 119-125; 136-184).

Defendant offered no testimony or evidence on his behalf (BE p. 528). Defendant's attorney in the trial court made no opening or closing statement (BE pp. 2; 528).

The State at trial attempted to introduce into evidence Exhibit 19, which was a coin purse, and Exhibit 20, which was a watch and ring, which the State showed belonged to the victims (BE pp. 47-49). The watch and ring were found in the coin purse, which in turn was found under a mattress in the motel room where Taylor was arrested (BE pp. 320-324). A keyring with an identification tag containing Widener's license plate number was also found in the motel room in a closed suitcase on the floor. Testimony about this evidence was also permitted (BE pp. 320-324). Defendant's counsel in the lower court made an oral

motion as to the admission of this evidence to exclude this evidence because there was no search warrant (BE pp. 311-312). The court thereupon excused the jury and held a hearing outside the presence of the jury (BE p. 312). Over objection, the evidence was admitted into evidence (BE pp. 320-324). The defendant assigned as error in his motion for new trial the admission of these items into evidence (TR p. 32), which was overruled by the court on January 3, 1975 (TR pp. 37-38). Thereafter, this point was presented to the Criminal Court of Appeals in Tennessee by brief and was decided adversely to Petitioner. Thereafter, Petitioner applied to the Supreme Court of Tennessee for a writ of certiorari and included as an assignment of error that this evidence was improperly admitted into evidence. After the Petition for Writ of Certiorari was denied, Petitioner has sought review of this issue in this Court.

During the direct examination of State's witness Dunn, the Assistant Attorney General asked Mr. Dunn a question with reference to his involvement in the purchases at the Sears & Roebuck Store in Memphis; Dunn asserted his Fifth Amendment right and the court sustained the Fifth Amendment privilege of Mr. Dunn (BE pp. 412, 413). Witness Dunn was asked on cross-examination why he left California in a hurry prior to coming to Tennessee. The court permitted the witness to assert his Fifth Amendment privilege with respect to that matter (BE p. 439). The court generally sustained the assertion of Dunn's Fifth Amendment privilege with respect to his activities in Memphis after the murders (BE pp. 443-450), to which ruling the Defendant excepted (BE pp. 447, 450). At the beginning of Mason's testimony, the court announced to the jury that an attorney representing Mr. Mason would be in the courtroom and that the attorney would be permitted "to

stand here and make proper objections, if any, to the questions that the State's lawyer asked him, questions involving constitutional rights to not give evidence against himself." (BE p. 457). Thereafter, the court announced it would make the same ruling in Mason's case as it had made with respect to Dunn's testimony, the court stating "so you can understand, we'll try to follow the same outline of rulings and permit the questions or not as I did this other witness." (BE p. 458). During direct examination of witness Mason, the court sustained the assertion of the Fifth Amendment privilege by witness Mason with respect to his activities in the Sears & Roebuck Store in Memphis (BE p. 84) and with respect to the question whether Mr. Mason was arrested with a gun in Memphis (BE pp. 487-488). During cross-examination, the court sustained the apparent assertion of the privilege of Mason with respect to (a) whether or not he fled California because he was charged with armed robbery (BE p. 493) and (b) whether or not he had ever carried false identification in California (BE pp. 498-499). (The defendant excepted to this latter ruling at BE p. 499.) Defendant assigned the limitations on cross-examination and the improper assertion of the Fifth Amendment privilege in his motion for new trial (TR p. 32), which was overruled by the court (TR pp. 37-38). Thereafter, the defendant raised the matter before the Court of Criminal Appeals of the State of Tennessee and in his Petition for Writ of Certiorari to the Supreme Court of Tennessee. After being overruled in both courts, he brings this Petition to this Court for certiorari for review of this issue.

REASONS FOR GRANTING THE WRIT

1. The Opinion of the Court of Criminal Appeals of Tennessee should be reviewed by this Court:

(a) Because the court decided this case in a way probably not in accord with applicable decisions of this Court, to-wit: this Court has never held that a "harmless error" rule is applicable to violations of rights guaranteed under the Fourth Amendment to the United States Constitution, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1963);

(b) Because the court has decided a question of substance not heretofore determined by this Court, to-wit: the court decided that in cases involving violations of rights guaranteed under the Fourth Amendment to the United States Constitution the rule which may have been stated by this Court in *Fahy v. Connecticut*, 375 U.S. 85 (1963), would govern the facts of this case, rather than rules which have been stated in two other cases by this Court, namely *Chapman v. California*, 386 U.S. 18 (1967), and *Harrington v. California*, 395 U.S. 250 (1969).

In any event, under any of the standards which the Court may wish to apply, the Constitutional error in this case cannot be said to be "harmless".

Facts concerning the illegal search and seizure are well stated by the Court of Appeals in its Opinion, reported at pages A4-A6 of the Appendix to this Petition and need not be restated here. Petitioner submits that the Court of Appeals was correct in deciding that the watch, ring, coin purse and keyring seized from a Memphis motel room were seized in violation of this Petitioner's rights under the Fourth Amendment to the United States Constitution.

Petitioner submits, first, that the Court of Appeals decided this case contrary to its own decisions. This Court has held in *Mapp v. Ohio*, 367 U.S. 643 (1963), that the prohibition against unreasonable searches and seizures as provided for in the Fourth Amendment to the United States Constitution was applicable to the States through the instrumentality of the due process clause of the Fourteenth Amendment to the United States Constitution—and this protection included the exclusion of evidence obtained in violation of the Fourth Amendment. Since that time, this Court has, it is respectfully submitted, created no exception to the exclusionary rule. This Court, in fact, left intact, the exclusionary rule last Term. *Stone v. Powell*, 96 S.Ct. 3037 (1976). Justice Powell's discussion of the Fourth Amendment in the latter case nowhere mentions a "harmless error" rule—rather, the Opinion emphasizes the fact that illegally seized evidence is an affront to judicial integrity. 96 S.Ct. at pp. 3046-3049. It is submitted that the prohibition against unreasonable search and seizure involves a constitutional right so basic to a fair trial that any infraction thereof can never be treated as harmless error. Thus, this Court has held in *Gideon v. Wainwright*, 372 U.S. 335 (1963) the violation of the right to counsel could not be treated as harmless error. Similarly, in *Payne v. Arkansas*, 356 U.S. 560 (1958), the Court held the prohibition against coerced confessions could never be treated as harmless error. Also, in *Toomey v. Ohio*, 273 U.S. 510 (1927), this Court has held that a violation of the right to an impartial judge could never be treated as harmless error.

Many lower courts, however, have read three decisions of this Court as announcing a "harmless error" rule with respect to errors of a constitutional dimension. The Court of Appeals in this case, for instance, held that *Fahy v.*

Connecticut, 375 U.S. 85 (1963) announced a rule that, in search and seizure cases where a defendant's Fourth Amendment rights have been violated, the standard of review "demands only that there be a reasonable possibility that the evidence complained of might have contributed to the conviction." (Opinion, at p. A7 of the Appendix hereto.)

It is respectfully noted, however, that this Court never reached the determination of "harmless error" in *Fahy*. In *Fahy*, there was no question under the facts of that case the evidence introduced was prejudicial, so that the Court did not decide whether it was possible for there to be "harmless error" in the introduction of the illegally seized evidence.²

Subsequently, in *Chapman v. California*, 386 U.S. 18 (1967), this Court adopted a different formulation governing review of errors of a constitutional magnitude. In *Chapman*, the Court held that a constitutional error is harmless where it is established beyond a reasonable doubt that the error did not contribute to the verdict. 386 U.S. at pp. 21-22. However, this case arose, not in the context of a Fourth Amendment violation, but rather in the context of an improper comment by the prosecutor on the accused's failure to testify, a Fifth Amendment matter. In still another context, this Court in *Harrington v. California*, 395 U.S. 250 (1969), appeared to change the rule yet again

2. Among the matters considered as showing that the illegally seized can of paint and a brush were prejudicial were: (1) use of the evidence to corroborate the testimony of an officer as to the petitioner's presence near the scene of the crime at about the time that it was committed; (2) use of the evidence as a basis for opinion testimony to the effect that the evidence matched the markings of swastikas painted on the synagogue; (3) some indication of the use of the illegally seized items to obtain a confession; and (4) the cumulative effect of the evidence causing defendants to take the stand and admit their acts.

with respect to review of constitutional error by shifting the inquiry from whether the error contributed to the verdict to whether the untainted evidence was so overwhelming that the error was harmless beyond a reasonable doubt. At p. 254. See also *Milton v. Wainwright*, 407 U.S. 371 (1972); *Schneble v. Florida*, 405 U.S. 427 (1972).

The different formulations of this Court have resulted in different standards being applied in the lower courts. Thus, in *U.S. v. Anderson*, 500 F.2d 1311 (5th Cir. 1974), the Court followed the *Harrington* test, and said that evidence obtained by an illegal search and seizure was insignificant compared with the untainted evidence. In *Powell v. Stone*, 507 F.2d 93 (1974), reversed on other grounds in this Court, cited *supra*, the Court followed the *Chapman* standard, mixing it apparently with the *Fahy* test, and stated that the sufficiency of the evidence was not at issue. At page 99. The Court then suppressed the evidence because the evidence did in fact contribute to the conviction. Other courts, in the Fourth Amendment area, have followed the *Fahy* or *Chapman* test. *U.S. v. Basurto*, 497 F.2d 781, 791 (9th Cir. 1974); *Howard v. Rumble*, 452 F.2d 904 (3rd Cir. 1971); *Vaccaro v. U.S.*, 461 F.2d 626 (5th Cir. 1972); *Holloway v. Wolfe*, 482 F.2d 110, 116 (8th Cir. 1973).

Thus, it appears that the Court of Appeals in deciding this case in light of the *Fahy* standard may have been in error not only because this Court has never decided that the harmless rule applies in Fourth Amendment cases, but also was in error because it may not have decided the matter in accordance with the applicable "harmless error" rule, if such exists.

In any event, the facts of this case—regardless of the standard employed—clearly show that the evidence illegally seized and admitted into evidence against Peti-

tioner was such that his Fourth Amendment rights were violated.

According to the Court of Appeals, the illegally seized evidence was harmless because "the coin purse found between the mattresses on the bed and car keys found in the suitcase did no more to incriminate defendant than it did the other occupants of the room. As a matter of fact the evidence admitted tends to exculpate more than implicate him. While it is true defendant was one of three occupants of the motel room he did not establish any proprietary interest in the bed where the jewelry and coin purse were found. If the evidence is to be accepted as it appears in the record the car keys were found in the suitcase which was the property of Richard Benjamin Dunn, and it was Mason who drove the automobile from Nashville to Memphis. On the other hand, the defendant's thumb print was found in the motel room occupied by the victim, Hazlewood. He was observed in an adjacent restaurant at the same time the victims were present there, only a few minutes before the homicide occurred. The death weapon was found in his possession. According to his co-defendants, it was he who brought Mr. Widener's automobile to the Driver Motel where they were staying in Nashville. It was he who insisted they leave Nashville; and he who produced the credit cards belonging to the victim, Widener, after they arrived in Memphis." (Appendix at pp. A7-A8).

However, the record reflects clearly that the case was a circumstantial one against this defendant. Moreover, the items illegally seized formed an important and necessary part of the evidence against this Petitioner. Thus, co-defendant Dunn testified that the suitcase which contained the keyring of one of the victims, which was found in the motel room, belonged to Taylor (BE pp.

451-452). Co-defendant Mason testified that the suitcase sure wasn't his (BE pp. 495-496). Dunn testified further that the coin purse containing the watch and ring found in the motel room wasn't his and that Taylor had a coin purse (BE p. 412). The murder weapon was found in the motel room, in plain view, which all three of the defendants occupied—the weapon was found by the door (BE pp. 308-309). The co-defendants' testimony was substantially impeached. Thus, both had plead guilty to being accessories after the murder in this cause (BE pp. 489, 381). Dunn was twice convicted before (BE p. 388). Mason had fled California to avoid charges there (BE p. 493) and had been at least arrested for armed robbery, possession of explosives, and fraudulent use of a credit card (BE pp. 493-494). The fingerprint evidence alluded to by the court was testified to by an "expert" who initially failed to finish high school and who had learned his art from a correspondence school (BE pp. 186-189). Identification by a witness of Taylor at the restaurant just prior to the murders was made in court without challenge by Taylor's trial counsel to the pretrial identification procedure (apparently no line-up was ever held), but in any event, this fact alone was certainly insufficient to charge or convict Taylor of the murders (BE pp. 227-235). Thus, whether the standard applied is *Fahy*, *Chapman*, or *Harrington*, the evidence complained of was certainly important and necessary to the State's case. Without this evidence, certainly the State's evidence was not "overwhelming".

2. The Opinion of the Court of Appeals (a) decided a federal question of substance in a way probably not in accord with an applicable decision of this Court, namely, *Pointer v. Texas*, 380 U.S. 400 (1965) in that the trial court in this cause erred in not striking the testimony

of witnesses Dunn and Mason in whole or in part after they asserted their Fifth Amendment rights not to incriminate themselves; (b) the Court of Appeals has decided a question of substance not heretofore decided by this Court, namely, whether it is proper to apply a harmless error rule, or whether the proper remedy is to strike the testimony of those witnesses who assert their Fifth Amendment rights while testifying against an accused.

Both Dunn and Mason gave extensive testimony and gave particular testimony concerning defendant's actions in Memphis, Tennessee and that the defendant had given them items recovered from the victims (BE pp. 405-421; 458-480).

During the direct examination of State's witness Dunn, the Assistant Attorney General asked Mr. Dunn a question with reference to his involvement in the purchases at the Sears & Roebuck Store in Memphis; Dunn asserted his Fifth Amendment right and the court sustained the Fifth Amendment privilege of Mr. Dunn (BE pp. 412, 413). Witness Dunn was asked on cross-examination why he left California in a hurry prior to coming to Tennessee. The court permitted the witness to assert his Fifth Amendment privilege with respect to that matter (BE p. 439). The court generally sustained the assertion of Dunn's Fifth Amendment privilege with respect to his activities in Memphis after the murders (BE pp. 443-450), to which ruling the Defendant excepted (BE pp. 447, 450). At the beginning of Mason's testimony, the court announced to the jury that an attorney representing Mr. Mason would be in the courtroom and that the attorney would be permitted "to stand here and make proper objections, if any, to the questions that the State's lawyer asked him, questions involving constitutional rights to not give evidence against himself." (BE p. 457). Thereafter, the court an-

nounced it would make the same ruling in Mason's case as it had made with respect to Dunn's testimony, the court stating "so you can understand, we'll try to follow the same outline of rulings and permit the questions or not as I did this other witness." (BE p. 458). During direct examination of witness Mason, the court sustained the assertion of the Fifth Amendment privilege by witness Mason with respect to his activities in the Sears & Roebuck Store in Memphis (BE p. 84) and with respect to the question whether Mr. Mason was arrested with a gun in Memphis (BE pp. 487-488). During cross-examination, the court sustained the apparent assertion of the privilege of Mason with respect to (a) whether or not he fled California because he was charged with armed robbery (BE p. 483) and (b) whether or not he had ever carried false identification in California (BE pp. 498-499). Clearly, the limitations on the inquiry by counsel below was constitutional error. The inquiries were relevant and material and were not obviated by other cross-examination.

This Court held in *Pointer v. Texas*, 380 U.S. 400 (1965), that the Sixth Amendment right of an accused to confront the witnesses against him is made obligatory upon the States by the Fourteenth Amendment. Thus, the right of confrontation is a federally protected right which the States must respect.

The right of cross-examination has been said by this Court to be at the core of the right of confrontation. See *Bruton v. U.S.*, 391 U.S. 123, 126 (1968); *Pointer*, *supra*. This Court has held, for instance, that the right of confrontation is violated when an accused is prevented from asking the correct name and address of the principal witness against him. *Smith v. Illinois*, 390 U.S. 129, 133 (1960). When the right of cross-examination is improperly abridged, serious constitutional error occurs. *E.g.*, *U.S.*

v. Morris, 485 F.2d 1385 at pp. 1386-87 (5th Cir. 1973). *U.S. v. Harris*, 501 F.2d 1, 8 (9th Cir. 1974) (cross-examination is principal means of testing witness reliability and credibility). See also *Park v. Huff*, 506 F.2d 849, 860 (5th Cir. 1975), *en banc*, *cert. denied*, 44 U.S.L.W. 3201 (Oct. 7, 1975) (confrontation clause guarantees rigorous and searching cross-examination).

The courts have held that when a witness refuses to answer questions on cross-examination, his testimony should be stricken in whole or in part. *U.S. v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963); *U.S. v. Scott*, 511 F.2d 15, 20-22 (8th Cir. 1975). This the court did not do, but apparently relied on some "harmless error" rule.

It is respectfully suggested that this Court has never adopted a "harmless error" rule in this Sixth Amendment context. It has in fact not ruled directly what the remedy will be when a witness invokes the Fifth Amendment privilege. Lower courts have said the testimony should be stricken in whole or in part. Some, like the court below, say the error is "harmless". This Court should resolve the confusion in the courts below.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Criminal Appeals of Tennessee.

Respectfully submitted,

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APPENDIX

**IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE**

NASHVILLE, OCTOBER SESSION, 1975

No. B-2751 DAVIDSON COUNTY CRIMINAL

**MAURICE McKINNEY TAYLOR,
Plaintiff-in-Error,**

v.

**STATE OF TENNESSEE,
Defendant-in-Error.**

Hon. John L. Draper, Judge

(Murder, 1st Degree, Two Counts)

**FOR PLAINTIFF IN
ERROR:**

**Robert T. McGowan
Assistant Public Defender
303 Metro Court House
Nashville, Tennessee**

**FOR DEFENDANT IN
ERROR:**

**R. A. Ashley, Jr.
Attorney General
Supreme Court Bldg.
Nashville, Tennessee**

**R. Jackson Rose
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Asst. District Attorney Gen.
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Nashville, Tennessee**

John E. Rodgers
Asst. Dist. Attorney General
1st Floor, Metro Courthouse
Nashville, Tennessee

AFFIRMED

OPINION FILED: June 8, 1976

CHARLES H. O'BRIEN, JUDGE

OPINION

(Filed June 8, 1976)

Defendant was convicted on a two count indictment charging him with murder in the first degree in the deaths of James P. Widener and Mildred L. Hazelwood. He was sentenced to life imprisonment.

Defendant first says the trial court erred in allowing a medical examiner to give his opinion as to whether or not a bullet in one of the bodies had not only separated, but to also express an opinion that this bullet was designed to separate.

The transcript of the record and defense brief in this case do not comply with the rules of this court in that there has been no attempt to abridge the record (Rule 1); nor any effort made to omit from the Bill of Exceptions immaterial or uncontroverted matter which does not bear on the grounds assigned in the trial court for new trial (Rule 2); nor does the brief make reference to the pages of the record where the errors complained of appear (Rule 14). Nevertheless, despite these discrepancies we have examined this voluminous record carefully to determine if there was error in the trial proceedings.

The error first complained of by defendant did not actually occur. The medical examiner's qualifications as an expert were stipulated. In addition to the stipulations he testified he had been County Medical Examiner for approximately eight (8) years and in that capacity examined approximately fifty gunshot wounds annually. An attempt was made by State's counsel to elicit an opinion from the doctor to the effect that certain types of bullets would explode on impact. Although it is not so stated in the record, it is evident that the district attorney intended to relate this type bullet to those missiles extracted from the bodies of the victims. Defense counsel properly objected, and questioning in this vein was disallowed by the trial Judge. The doctor was allowed to testify that a projectile which had entered the brain of one of the victims had separated and was removed in two pieces. Also, that he removed part of a projectile from a head wound in the other victim. A hypothetical question was posed by the district attorney regarding the effect on the human body if a bullet exploded upon impact. Objection to this line of questioning was sustained. The doctor was allowed to testify about the effect upon a human body where a bullet separates upon impact. In light of the examination of the bodies of the victims by the doctor which disclosed that the death missiles had in fact separated upon impact, we do not find any abuse of the trial judge's discretion in allowing this testimony. We think the doctor was fully qualified to testify as he did on the basis of his experience as County Medical Examiner. Had the admission of this testimony been error, it could be no more than harmless error in view of the fact that a fire arms examiner for the Tennessee Bureau of Criminal Identification subsequently testified that the projectiles taken from the bodies of the victims had been fired from a weapon taken from defendant at the time of his arrest.

That these bullets were jacketed hollow points, the primary design and function of which was to cause the nose of the bullet to explode, expand, or mushroom upon impact.

By the second assignment it is urged that the trial court erred in qualifying a police officer as a fingerprint expert and allowing him to give expert testimony concerning fingerprints.

Testimony of Metro Police Officer Jimmy Rogers was offered for the purpose of making a comparison between a latent fingerprint found in a motel room occupied by one of the homicide victims and an identified fingerprint of the defendant. In a lengthy out-of-jury hearing the trial Judge determined that the witness was qualified as an expert to testify in the area in which his testimony was offered. It appears he was a graduate of an F.B.I. Improved Correspondence Course, had some three years experience and training under the supervision of an expert in the field, and had himself testified as an expert approximately ten times prior to the trial. His testimony regarding his area of expertise was subjected to rigid cross-examination. The qualification of an expert witness is a matter within the sound discretion of the trial court, and his decision in such matters will not be reversed on appeal, absent a clear abuse of discretion. *Fortune v. State*, 277 S.W.2d 381, 197 Tenn. 691; *Murray v. State*, 377 S.W.2d 918, 214 Tenn. 51. We find no reason to disturb the trial court's ruling on this issue.

Defendant complains that the trial court erred in allowing in evidence the fruits of a search conducted by the Memphis Police Department in a motel room, without the benefit of a search warrant.

Several days after the homicides the defendant was apprehended in Memphis, Tennessee in the company of

Richard Benjamin Dunn and Philip Glenn Mason, who were co-defendants prior to submission of guilty pleas to the lesser offense of accessories after the fact to murder. These three were arrested at the Cayce Motel in that city. They had endeavored to use credit cards owned by the deceased, James P. Widener, and had abandoned his automobile in which they had travelled to Memphis, after hearing news reports that a state-wide search was being conducted for them. Dunn and Mason were apprehended outside of the motel room occupied by defendant, a shoot-out occurred resulting in defendant's ultimate surrender. When defendant emerged from the motel room he was carrying a large red suitcase. He dropped a pistol inside the door which proved to be the murder weapon. Officers entered the motel room to determine if there was anyone else present, and for the further purpose of securing evidence in the room. The pistol was lying in a chair immediately inside the front door. At that time all three defendants were in custody and in the process of being transported to the Memphis Police Station. A thorough search of the motel room was made. A coin purse containing a diamond ring and a wrist watch was discovered under the mattress of one of the beds. These items were the property of the victim, Mildred Hazelwood. There were two suitcases in the room in addition to the one deposited by this defendant on the front porch. The keys to the car owned by the victim, James Widener, were found in one of the suitcases. Objection was made to the admission of this evidence because the police had not obtained a search warrant. After an out-of-jury hearing the trial Judge ruled that the evidence was admissible. He stated the basis for his reasoning to be that when police flush suspects in a murder case out of a house they have got to go in and see what they can find which might lead them to the murder. He reasoned that the

defendants had lost the care, custody and control of the room upon their arrest, and if the room had been sealed and a search warrant obtained there would have been no defendant present to serve a warrant on. That any warrant obtained had to be served on the operators of the motel, therefore, defendant had no standing to object to the search without a warrant. That the police had a duty to protect the defendant's property and the search made was in the nature of an inventory search.

Defendant cites only State law to sustain this assignment, but does seem to suggest that he relies on a violation of his rights under the Federal Constitution as well. We shall examine the question from both views since we have reached the conclusion that his honor the trial Judge did err in allowing the admission of the evidence complained of.

Without reiterating the reasons set forth by the trial Judge for the admission of the evidence, it is sufficient to say that the Tennessee Constitutional provisions against unreasonable searches and seizures are identical in intent and purpose with the 4th Amendment of the United States Constitution. (Constitution of Tennessee, Art. 1, Sec. 7) (U.S. Constitution, Amend. 4): *Sneed v. State*, 423 S.W.2d 857, 221 Tenn. 6; *Ellis v. State*, 364 S.W.2d 925, 211 Tenn. 321. The guidelines delineating the limit beyond which a warrantless search may not proceed are set out in *Chimel v. Calif.*, 89 S. Ct. 2034, 395 U.S. 755, 23 L.Ed.2d 686, which holds in summary that police officers must whenever practical, obtain advance judicial approval of searches and seizures through warrant procedures; that an arrest does not justify a routine search through closed or concealed areas in a room where the arrest occurs; that a search, under circumstances such as those existing in this case, may not extend beyond the search of the person arrested

and the area in his reach, if the search is to retain the distinction of being classified as reasonable. There was no justification, under the facts of this case, for the search into the suitcases, and between the mattresses on the bed by the Memphis police officers. The five basic exceptions to the requirement for a search warrant are (1) consent, (2) incident to a lawful arrest, (3) probable cause to search with exigent circumstances, (4) in hot pursuit, (5) a stop and frisk situation. None of these elements were present in this case. We can only view the search as illegal and improper.

It does not necessarily result however that the failure of the police officers to comply with the constitutional restrictions regarding searches and seizures requires an automatic reversal in this case. The harmless error statute in this State provides, in pertinent part, that no verdict or judgment shall be set aside or new trial granted on account of the improper admission or rejection of evidence unless, in the opinion of the appellate court to which application is made, after an examination of the entire record in the cause, it shall affirmatively appear that the error complained of has affected the results of the trial (T.C.A. Sec. 27-117). The Federal criteria demands only that there be a reasonable possibility that the evidence complained of might have contributed to the conviction. *Fahy v. Conn.*, 84 S.Ct. 229, 375 U.S. 85. It is plain that the trial Judge's error in admitting the evidence obtained in the unlawful search of the Memphis motel room did not violate either standard. The jewelry and coin purse found between the mattresses on the bed and the car keys found in the suitcase did no more to incriminate defendant than it did the other occupants of the room. As a matter of fact the evidence admitted tended to exculpate more than implicate him. While it is true defen-

dant was one of three occupants of the motel room he did not establish any proprietary interest in the bed where the jewelry and coin purse were found. If the evidence is to be accepted as it appeared in the record the car keys were found in the suitcase which was the property of Richard Benjamin Dunn, and it was Mason who drove the automobile from Nashville to Memphis. On the other hand, defendant's thumbprint was found in the motel room occupied by the victim, Hazelwood. He was observed in an adjacent restaurant at the same time the victims were present there, only a few minutes before the homicides occurred. The death weapon was found in his possession. According to his co-defendants it was he who brought Mr. Widener's automobile to the Driver Motel where they were staying in Nashville. It was he who insisted they leave Nashville; and he who produced the credit cards belonging to the victim Widener, after they arrived in Memphis.

Finally, defendant says it was error to limit his right of cross-examination, and confrontation of State witnesses, Richard Benjamin Dunn and Phillip Glen Mason.

These witnesses were his co-defendants against whom the charges of 1st degree murder were stricken.

Defendant's brief correctly states the law to be that he has the right to cross-examine a witness who has testified to material matters so long as his cross-examination is relevant to a material issue in the law suit. *Monts v. State*, 379 S.W.2d 34, 214 Tenn. 171; *Davis v. State*, 212 S.W.2d 374, 186 Tenn. 545. We have examined this record carefully and find that both of these witnesses were cross-examined extensively, and that the cross-examination covered every relevant facet of their participation and knowledge of the circumstances surrounding the

charge against defendant. Both of these witnesses were represented by counsel at trial who advised them when it would be appropriate for them to assert their rights under the 5th Amendment of the United Constitution to avoid incriminating themselves in regard to other criminal matters in which they were involved. Except for a few limited instances the witnesses were required to respond to the cross-examination under the threat of contempt charges. Those times when the 5th Amendment was pleaded and sustained generally involved matters which were not material, and had no relevance to the issue at hand, that is the guilt or the innocence of this defendant. The only benefit to the defendant which might have been attained by requiring answers to those questions would have been to attack the credibility of the witnesses. This was otherwise successfully accomplished and any additional benefit which might have been attained by cross-examination certainly did not outweigh the right of these witnesses to avoid incriminating themselves in reference to other charges pending against them.

The judgment of the trial court is affirmed.

/s/ Charles H. O'Brien
Judge

CONCUR:

/s/ William S. Russell
Presiding Judge

/s/ William A. Harwell
Judge

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DOCKET NUMBER B-2751 C.C.A.

DAVIDSON CRIMINAL

MAURICE MCKINNEY TAYLOR,
Petitioner,

VS.

STATE OF TENNESSEE,
Respondent.

ORDER

(Filed August 16, 1976)

On considering the petition for certiorari and briefs filed in this case and the entire record, the petition of Maurice McKinney Taylor is denied at cost of petitioner.

PER CURIAM

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SUPREME COURT OF THE UNITED STATES

No. A-385

MAURICE McKINNEY TAYLOR,
Petitioner,

v.

TENNESSEE.

**ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI**

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 14, 1976.

/s/ Potter Stewart

Associate Justice of the Supreme
Court of the United States

Dated this 10th day of November, 1976.